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**BEFORE THE ARIZONA CORPORATION CO**

**RECEIVED**

COMMISSIONERS

MARC SPITZER, Chairman  
WILLIAM A. MUNDELL  
JEFF HATCH-MILLER  
MIKE GLEASON  
KRISTIN K. MAYES

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AZ CORP COMMISSION  
DOCUMENT CONTROL

In the matter of:	)
INTERSECURITIES, INC.	)
570 Carillon Parkway	)
St. Petersburg FL 33716-1202	)
GREGORY RUSSELL BROWN AND KAREN	)
BROWN, husband and wife	)
16417 South 15 <sup>th</sup> Drive	)
Phoenix AZ 85045	)
CRD #2233684	)
Respondents.	)

DOCKET NO. S-03482A-03-0000

**SECURITIES DIVISION'S  
RESPONSE TO RESPONDENT'S  
MOTION FOR ORDER  
ALLOWING DEPOSITION OF  
WENDY COY  
AND  
MOTION TO STRIKE ANY  
DEFENSE BASED UPON ALLEGED  
RELIANCE ON ORAL  
STATEMENTS OF DIVISION  
EMPLOYEE**

The Securities Division of the Arizona Corporation Commission ("Division") hereby responds to Respondent's Motion for Order Allowing Deposition of Wendy Coy ("Motion"). The Division objects to ISI's request to conduct discovery that is not relevant or necessary for its defense.

The Division further requests a ruling striking any defense based upon ISI's alleged reliance on the alleged oral statements of a Division employee because such reliance does not support any defense as a matter of law.

**I. Background.**

The Division has alleged that ISI, while operating in Arizona as a registered securities dealer, formally approved a request by one of its salesmen to sell unregistered securities within and from Arizona. The Division has further alleged that as a result of ISI's affirmative misconduct, the respondent firm participated in its salesman's violations of the Arizona Securities Act (the "Act") and failed to reasonably supervise its salesman, and that ISI should be required to correct the harm done to the purchasers of those securities.

Arizona Corporation Commission

**DOCKETED**

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1 The Division's Notice alleges that before approving Greg Brown's request to sell the payphone  
2 investments, ISI told Brown to contact the Division stating, in part: "Arizona was one of the states that  
3 uncovered fraudulent payphone operations." *See Notice at par. 20; see also Brown EUO Exhibit 4, ISI*  
4 *FAX to Brown dated April 26, 1999, attached hereto as Exhibit "B".* The Notice further alleges that  
5 Brown told ISI that a "Wendy" informed him that certain payphone investments offered in Arizona  
6 had problems because they were limited partnerships and therefore securities. *See Notice at par. 21;*  
7 *see also Brown EUO Exhibit 5, Brown's memo to ISI dated April 28, 1999, attached hereto as Exhibit*  
8 *"C".* ISI was in possession of this information when it abdicated its due diligence and supervisory  
9 responsibilities.

10 ISI argues that the allegations of the Notice support a claim for ISI's defense to liability under a  
11 theory that ISI relied on "Wendy's" statements in determining that the payphones were not securities.  
12 Based upon this asserted defense, ISI has requested the ALJ to issue an order allowing ISI to depose  
13 Wendy Coy, an attorney at the Division. ISI's Motion should be denied because ISI has no need to  
14 depose Ms. Coy and the substance of the alleged conversation between "Wendy" and Mr. Brown is not  
15 relevant or material to any legal defense. Contrary to ISI's argument, although there may be some  
16 dispute as to the substance such a purported conversation between Mr. Brown and "Wendy", the  
17 Division does not dispute Mr. Brown's interpretation of the alleged conversation, and has not put the  
18 substance of that purported conversation "at issue." Whatever Mr. Brown may believe that he heard or  
19 understood from his conversation with "Wendy", it does not support ISI's theory of reliance. ISI's  
20 argument that the disputed "interpretation" of the alleged substance of the conversation is "crucial" to  
21 its defense is mistaken because neither Brown's nor ISI's nor the Division's "interpretation" of the  
22 alleged conversation is relevant or material to ISI's theory of reliance in this case, for reasons stated  
23 fully in the legal discussion below. ISI can prove no legal theory supporting a defense based upon the  
24 Division's alleged statements to Brown.<sup>1</sup>

25  
26 <sup>1</sup> Brown is no longer a respondent in this case as a result of a final consent order, Decision No. 67087, entered by the Commission on June 29, 2004.

1 The Notice alleges the fact of the undisputed communications *between ISI and Brown* because  
2 **they are material** to ISI's *primary liability* for Brown's sale of unregistered securities and fraud under  
3 the Act. The substance of the communications *between ISI and Brown* demonstrate ISI's knowledge  
4 of and duty of inquiry as to the primary violations of the Act, which is one of the elements of primary  
5 liability for participation under the legal theory of aiding and abetting the sale of unregistered securities  
6 and fraud. *State v. Superior Court*, 123 Ariz. 324, 331, 599 P.2d 777, 784 (1979) (The three  
7 prerequisites to a finding that one has aided and abetted a securities law violation include a primary  
8 violation, knowledge of or a duty of inquiry with regard to the primary violation by the person charged,  
9 and a necessary contribution to the underlying scheme by the person charged.) "A defendant who aids  
10 and abets another's violation respecting the use of manipulative or deceptive devices in the sale of [a  
11 security] ... is liable as a principal." *Id.* (There is no element requiring proof of financial benefit to  
12 prove these primary liability claims, which is a subject for future analysis in this case.)

13 ISI should not be allowed to depose Wendy Coy in this case. The Division has already fully  
14 briefed the issues relating to the lack of relevance, or need, for the discovery ISI seeks in the Division's  
15 response to ISI's previous attempt to obtain a copy of Ms. Coy's employee personnel file. The alleged  
16 statements attributed to Wendy Coy are not relevant for reasons discussed in the Division's Response  
17 to Motion to Compel, filed in this matter on August 4, 2004, incorporated herein by this reference.  
18 A.A.C. Rule R14-3-109(P) permits depositions only "in the manner prescribed by law." A.R.S. § 41-  
19 1062(A)(4) requires a proponent of discovery devices to demonstrate reasonable need. There is no  
20 need, reasonable or otherwise, for the deposition of Wendy Coy. ISI can examine Ms. Coy at hearing.

21 The substance of the memos exchanged between ISI and Brown is recounted below. The first  
22 memo from Brown, Brown EUO Exhibit 3, date-stamped "RECEIVED" by ISI Compliance Dept. on  
23 April 26, 1999, is attached hereto as Exhibit "A", and states as follows:

24 Rod,

25 Please review these materials regarding the phone business  
26 opportunities that we talked about on April 19<sup>th</sup>. Let me know as soon as  
possible if you can. Call me at 602-706-3900.

1 Thanks,  
2 Greg Brown

3 If this ok (sic) to market, please return materials.

4 The responding memo from ISI is a FAX sheet from Rodney A. Tidwell, Assistant Vice President  
5 Compliance, to Greg Brown, attached hereto as Exhibit "B", stating in full:

6 Re: BCI/ETS Payphones, Arizona was one of the states that uncovered  
7 fraudulent (sic) payphone operations; check with the Commissioner (sic)  
8 of Securities to see if this operation has A) operated in AZ B) Has a  
9 clean record. If yes to both questions, let me know and a decision will be  
10 made—Your literature will then be returned.

11 R

12 (Note: there is no mention of "checking to see" if the Division considered the products to be  
13 "securities".) ISI claims that it relied on Brown's responding memo, attached to Exhibit C hereto:

14 April 28, 1999

15 To: Rodney A. Tidwell, Assistant Vice President Compliance,  
16 Intersecurities, Inc.

17 Re: Legitimacy of Pay Phone Business Opportunity

18 Yesterday I had a phone conversation with an attorney for with (sic)  
19 Arizona Securities Department (sic), Wendy, regarding two companies that  
20 have been made known to me, ETS Phone Management Co. with BCI  
21 Financial the leasing company in affiliation, and Phoenix Telecom with Tri-  
22 Financial the leasing Co. that are selling opportunities for customers to  
23 purchase pay phones directly. Both companies had clean records, she had no  
24 knowledge of having a problem with either company, and both companies  
25 have and are operating in Arizona.

26 Aside from these memos exchanged between ISI and Brown, there is no evidence of any involvement  
of the State in the transactions or communications by Brown and ISI relating to the sale of payphones.

ISI offers Brown's examination under oath ("EUO") testimony before the Securities Division  
as the factual basis for its claim of reliance. However, that testimony did not occur until long after the  
damage was done. What ISI evidently relied on was not Brown's EUO testimony, but the memo that

1 Brown wrote to ISI relating his purported conversation with "Wendy" (Exhibit C).<sup>2</sup> ISI relied only  
2 upon Brown's statements and marketing materials generated by the promoters of the investments to  
3 approve Brown's sale of the payphone investments. In point of fact, the FAX from ISI to Brown  
4 (Exhibit B) and Brown's response to ISI (Exhibit C) are the *only* communications between Brown and  
5 ISI relating to Brown's purported conversation with "Wendy". The day after ISI received that memo  
6 from Brown, ISI approved Brown's sale of the ETS and Phoenix payphone investments. *See Notice at*  
7 *par. 22; see also ISI Memo to Brown dated April 29, 1999, attached hereto as Exhibit "D".*

8 Ms. Coy generated no writing that is at issue in this case. By contrast, of the two former ISI  
9 employees that the Division seeks to interview, Mr. Rod Tidwell generated the memos that are directly  
10 at issue in this case, and Mr. Ronald Klimas, ISI's Assistant Vice President and Counsel in 1996, prior  
11 to the events at issue in this case, generated a letter for the firm to another ISI salesman in Arizona  
12 concluding that certain other payphone investments were, in fact, securities. These writings are clearly  
13 directly and highly relevant to the claims and defenses asserted herein. *See letter dated July 25, 1996,*  
14 *from Klimas to Mr. Robert Shearburn, attached hereto as Exhibit "E".* The Division has already  
15 responded to ISI that there is no record that Ms. Coy took any calls for the Division on or near the  
16 alleged date of the purported conversation. ISI has disclosed no other communication with the  
17 Division prior to or during the conduct giving rise to this action. Yet the statements attributed to Ms.  
18 Coy simply do not support any claim of reliance under any theory, and ISI's inferences regarding those  
19 statements, which ISI claims to have relied upon, are not supported by the statements themselves.

20 Mr. Brown will be available to testify at hearing, and so will Ms. Coy. The Division will  
21 stipulate to the admissibility of Mr. Brown's testimony, both at his examination and at hearing, as to  
22 his understanding of any statements made to him by any employee of the Division. Ms. Coy may also  
23 be questioned at hearing regarding any relevant factual issues, if any, relating to Mr. Brown's  
24 understanding of his alleged conversation with a Division employee. ISI has no need, and no right, to

25 \_\_\_\_\_  
26 <sup>2</sup> Claiming that ISI relied on Brown's EUO testimony taken by the Division after-the-fact is tantamount to attempting to  
"create" evidence after-the-fact. Indeed, ISI's legal counsel accompanied Brown to the examination under oath before the  
Division, and prepared and advised Brown prior to and during that examination.

1 depose Ms. Coy with respect to the alleged statements to Mr. Brown. To allow the use of such  
2 unnecessary discovery devices would be enabling the unnecessary deployment of state resources, both  
3 time and personnel, to pursue defenses that are not available under law.

## 4 II. Legal Discussion

### 5 A. ISI Has No Reasonable Grounds and No Need for Taking Ms. Coy's Deposition; 6 ISI's Motion Should Be Denied.

7 The memos between ISI and Brown show that ISI had knowledge of prior investigations and  
8 enforcement actions by the Division involving payphone investments. ISI has offered no legal theory  
9 that would entitle it to shift its legal responsibility for its alleged misconduct to the State under these  
10 facts. There was no "special relationship" that could relieve ISI from its duty of inquiry as to the legal  
11 nature of its acts. *Cf. Mister Donut of America, Inc. v. Harris*, 150 Ariz. 321, 324, 723 P.2d 670, 673  
12 (1986) (finding a special relationship between a franchisor and its franchisee that could relieve one  
13 party from the duty to investigate necessary to show reasonable reliance).<sup>3</sup> There was no "transaction"  
14 with the State relating to the sale of these investments. *Cf. St. Joseph's Hospital v. Reserve Life Ins.*,  
15 154 Ariz. 307, 316, 742 P.2d 808, 817 (1987) (To determine whether one party to a transaction was  
16 justified to rely on the other party's representations depends on the complaining party's own  
17 information and intelligence). One must only read the memos to observe that they offer no support for  
18 any theory of misrepresentation of a material fact. The alleged communications simply do not support  
19 any defense to ISI's liability under any legal theory.

20 Essentially, ISI argues that Ms. Coy told Brown, that she had "no problem" with his sale of  
21 ETS or Phoenix payphone investments as long as they did not involve limited partnerships. ISI claims  
22 that Ms. Coy's testimony on the substance of her conversation with Brown is "crucial" to its defense.  
23 However, ISI cannot support a defense to liability under the Act based upon its purported reliance on  
24 the alleged oral statements of a Division employee without any formal action or any writing. *See e.g.*,

25 <sup>3</sup> Indeed, had ISI pursued even minimal inquiry, it could easily have discovered additional facts that would have further put  
26 it on notice of the potential harm to investors, and of its own potential liability under the statute for approving such sales,  
including orders issued by other states against the payphone companies that sponsored the investments that ISI  
permitted Brown to sell, both prior to and during the time period of ISI's approval of Brown's sales. *See Notice* at  
paragraphs 17, 18, 23-26, 29, 32.

1 *Valencia Energy Co. v. Ariz. Dep't of Revenue*, 191 Ariz. 565, 959 P.2d 1256 (1998) and discussion at  
2 pp. 8-10 of Division's Response to Motion to Compel. Moreover, ISI could not claim equitable  
3 estoppel against the State based upon a misstatement concerning the legal effect of a statute. *Id.* ISI  
4 has offered no justification for taking Ms. Coy's deposition other than for the purpose of proving  
5 reliance. Since reliance is not a defense in this case, ISI has no need to take Ms. Coy's deposition.

6 The substance of the purported conversation between Brown and a Division employee does not  
7 support any defense to ISI's liability in this case and has no legal effect on the Commission's  
8 enforcement of the statute. Contrary to ISI's position, any disagreement as to the purported  
9 conversation between Mr. Brown and Ms. Coy would be immaterial to the enforcement of the statute  
10 against ISI. The government is not estopped "from correcting a mistake of law." *Thomas and King,*  
11 *Inc. v. City of Phoenix, Development Advisory Board*, \_\_\_ Ariz. \_\_\_, 92 P.3d 429, 429 Ariz. Adv. Rep.  
12 68 (App. 2004), quoting *Valencia Energy v. Ariz. Dep't of Revenue*, 191 Ariz. 565, 576, 959 P.2d  
13 1256, 1267 (1998) (copy of case attached to ALJ's copy of this Response/Motion) (That Phoenix  
14 employees previously were inconsistent in their enforcement of the Uniform Building Code does not  
15 demonstrate that the City of Phoenix Development Advisory Board acted arbitrarily in its denial of a  
16 requested modification or even support equitable estoppel.). ISI had no right to rely on the statement  
17 of its salesman regarding a purported statement of a Division employee concerning the legal effect of  
18 either the salesman's or ISI's actions under the statute.

19 Contrary to ISI's position, the Division does not disagree, or take issue, with Mr. Brown's  
20 interpretation or understanding of the statements attributed to Ms. Coy. The alleged statements are  
21 immaterial. Equitable estoppel generally may not be invoked against the sovereign. *Freightways,*  
22 *Inc. v. Arizona Corp. Comm'n*, 129 Ariz. 245, 247, 630 P.2d 541, 543 (1981). Even if Mr. Brown  
23 understood and interpreted a verbal statement made by a state employee that the payphone investments  
24 were not securities if they were not limited partnerships, such a statement is not binding on the  
25 Commission because it is not the law. The government may be estopped only when its "wrongful  
26 conduct threatens to work a serious injustice and ... the public interest would not be unduly

1 damaged....” *Id.* at 248, 630 P.2d at 544. To permit a party to defend its liability under a statute by  
2 claiming reliance upon an alleged oral statement made to another party, with no formal conduct on the  
3 part of the government, would substantially impair the public interest. Such facts do not support a  
4 defense to statutory liability.

5 **B. ISI Cannot Support An Estoppel Claim Under the Facts of this Case.**

6 Although ISI has not articulated a theory of equitable estoppel, it has articulated the basis for its  
7 defense to liability is “reliance” on the oral statement of a government employee. Reliance is one of  
8 the elements of the equitable claim of estoppel. Numerous Arizona cases address equitable estoppel  
9 claims against various government agencies. *See, e.g., Carondelet Health Serv. V. Arizona Health*  
10 *Care Cost Containment Sys. Admin.*, 187 Ariz. 467, 930 P.2d 544 (App. 1996); *Rivera v. City of*  
11 *Phoenix*, 186 Ariz. 600, 925 P.2d 741 (App. 1996); *Carlson v. Ariz. Dept. of Econ. Sec.*, 184 Ariz. 4,  
12 906 P.2d 58 (1995); *Outdoor Systems, Inc. v. Arizona Dept. of Transp.*, 171 Ariz. 263, 830 P.2d 475  
13 (App. 1992).

14 “Equitable estoppel is generally applicable when the following factors are present:

- 15 (1) conduct by which one induces another to believe in certain material facts; and  
16 (2) the inducement results in acts in justifiable reliance thereon; and  
17 (3) the resulting acts cause injury.”

18 *Carlson v. Ariz. Dept. of Econ. Sec.*, 184 Ariz. 4, 5, 906 P.2d 58, 59 (1995). The doctrine will apply to  
19 the state **only** “if the government’s wrongful conduct threatens to work a serious injustice and if the  
20 public interest would not be unduly damaged by the imposition of estoppel.” *Id.* at 6, 906 P.2d at 60,  
21 quoting *Tucson Electric Power v. Ariz. Dept. of Revenue*, 174 Ariz. 507, 513-18, 851 P.2d 132, 138-43  
22 (App. 1993) (emphasis added).

23 The party attempting to estop the government must first show  
24 that the government engaged in wrongful conduct. *See Freightways*,  
25 129 Ariz. at 248, 630 P.2d at 544. In cases where the state’s actions  
26 involved mere negligence or oversight, the courts have refused to  
apply equitable estoppel. *See Outdoor Systems, Inc. v. Arizona Dept.  
of Transp.*, 171 Ariz. 263, 830 P.2d 475 (App. 1992)(finding that the  
state agency’s inadvertent issuance of three nonconforming sign

1 permits and failure to notice the error for two years did not amount to  
2 wrongful conduct which would give rise to equitable estoppel.  
(Citations omitted.)

3 Where equitable estoppel has been applied against the state,  
4 the state's action has been more egregious than it was in the instant  
5 case. See *Tucson Electric Power, supra* (referring generally to  
6 agency's "wrongful" obstructive conduct in arbitrarily refusing to  
7 perform obligations imposed upon it by statute); *Freightways*, 129  
8 Ariz. at 245, 630 P.2d at 541 (equitably estopping the agency from  
9 denying the validity of a "motor vehicle certificate" (sic) where the  
10 agency knew of the defect in the filing of the application, approved  
11 numerous transfers of the invalid certificate, and waited over fifty  
12 years before challenging the certificate's validity).

13 *Id.* Thus, the state's actions must constitute "affirmative misconduct"—intentional or willful  
14 misconduct, not mere neglect or oversight. *Rivera, supra*, 186 Ariz. at 603, 925 P.2d at 744. ISI  
15 cannot show wrongful conduct by the government, or any threat of serious injustice from enforcement  
16 of the statute, in this case.

17 "A claim for estoppel arises when one by his acts, representations or admissions intentionally  
18 or through culpable negligence induces another to believe and have confidence in certain material facts  
19 and the other justifiably relies and acts on such belief causing him injury or prejudice." *Carondelet*  
20 *Health Serv., supra*, 187 Ariz. at 470, 930 P.2d at 547. ISI claims that it relied on a conversation in  
21 which it was not even a participant. Regardless of Mr. Brown's alleged understanding of the purported  
22 statements, ISI relied not on any intentional or culpable negligent inducement of a government  
23 employee, but on the subjective statement of its own salesman concerning his understanding of an  
24 alleged conversation with a state employee on a matter for which he had a personal and a pecuniary  
25 interest. ISI, a national broker-dealer firm with a fully staffed compliance department, had its own  
26 independent responsibility to determine the legality of its conduct and compliance with securities laws.  
Equity will not permit ISI to shift its legal statutory responsibility to the State.<sup>4</sup> There is no injustice in  
enforcing the statute against ISI in this case.

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<sup>4</sup> ISI's claim that it relied on Brown's statement that "Wendy" said that the payphone investments were not securities unless they were limited partnerships is all the more absurd given that a plain reading of the definition of "security" under the Act does not even mention "limited partnerships."

1           The first element of estoppel requires a showing that the party to be estopped committed acts  
2 inconsistent with a position it later adopts. The *Valencia* court stated:

3           The first element requires affirmative acts inconsistent with the  
4 position later relied on. Common sense tells us that the evidentiary  
5 burden in cases such as the present would require that the state's action  
6 bear some considerable degree of formalism under the circumstances.  
7 An off-the-cuff opinion, for example, will not suffice if the question  
8 presented requires a measure of research or deliberation. It is rare that  
9 satisfactory evidence of an absolute, unequivocal, and formal state  
10 action will be found unless it is in writing.

11 *Valencia*, 191 Ariz. at 577, 959 P.2d at 1268. Even if the court accepts Brown's testimony regarding  
12 his conversation with "Wendy", ISI cannot overcome its evidentiary burden to show that the alleged  
13 state's action bears some degree of formalism under the circumstances. ISI should not be permitted to  
14 cloud the issues at hearing by pointing the proverbial finger at a Division employee where there is not  
15 even any writing that would bear any degree of formalism.

16           As to the second element of estoppel, "reliance by the other party," which in this case is ISI,  
17 the *Valencia* court stated as follow:

18           The second requirement demands both that the party claiming estoppel  
19 actually relied on the state's act and that such reliance was reasonable  
20 under the circumstances. ... That the reliance be reasonable requires,  
21 among other things, that the party seeking estoppel have acted in good  
22 faith by providing the state with correct information and neither knew  
23 nor was put on notice that the state's position was erroneous. ...  
24 Reliance is not justified where knowledge to the contrary exists.  
25 (*citation omitted*) (One who acts 'with a careless indifference to means  
26 of information reasonably at hand or ignores highly suspicious  
circumstances which should warn him of danger or loss cannot invoke  
the doctrine of estoppel.')

27 *Id* (*emphasis added*). Again, ISI has made no claim and offered no evidence that it provided any  
28 information to the Division or even made so much as a telephone call on its own behalf to elicit  
29 information from the State. *Cf. Carondelet Health Serv, supra*, 187 Ariz. at 470, 930 P.2d at 547  
30 (evidence that someone at AHCCCS named "Jennie" told her that the agency wanted "to work  
31 something out with her" could not support justifiable reliance). Even if ISI had contacted the Division  
32 directly, however, and had been told by a state employee that she had "no problem" with the

1 investments as long as they were not limited partnerships, the State would not be bound by a mere  
2 verbal statement that was a mistake of law.

3 As for the third element of equitable estoppel, injury: requiring the complaining party to  
4 comply with a statute is not a true "injury" under the law. *Thomas and King, Inc. v. City of Phoenix,*  
5 *Development Advisory Board, supra*, 92 P.3d 429, 429 Ariz. Adv. Rep. 68 (copy of case attached  
6 hereto). In *Thomas and King*, the court quoted *Valencia, supra*, 191 Ariz. at 577, 959 P.2d at 1268, as  
7 follows: "[D]etriment [necessary for estoppel] requires a positional change not compelled by law.  
8 Thus, no detriment is incurred when the party's only injury is that it must pay taxes legitimately owed  
9 under the correct interpretation of the law." In this case, ISI's only detriment is that it must suffer the  
10 consequences of its own statutory violations. That is not the type of "injury" that entitles ISI to claim a  
11 defense under the law.

12 Finally, the requirements of estoppel are conditioned by "the general rule that estoppel may  
13 apply against the state *only* when the public interest will not be unduly damaged and when its  
14 application will not substantially and adversely affect the exercise of governmental powers."  
15 *Freightways, supra, Inc.*, 129 Ariz. at 247, 630 P.2d at 543. When the state is not able to enforce  
16 the law because of the purported statements of an employee, the interests of the public are damaged.  
17 *Heckler v. Community Health Services*, 467 U.S. 51, 60 (1984). Estoppel will not be applied to the  
18 state when it will affect the exercise by the state of its governmental powers and sovereignty, or  
19 bind it by unauthorized acts of its officers and employees. *Freightways, Inc.*, 129 Ariz. at 248, 630  
20 P.2d at 544. Securities Division employees are not statutorily authorized to give legal advice to the  
21 public; a statement by an employee that contravenes statutory authority is not binding on the state.  
22 To permit a person to avoid liability under the Securities Act based upon a purported statement of  
23 opinion by a staff attorney responding to a routine telephone inquiry would effectively contravene  
24 the statutory authority of the sovereign. Such a liberal application of estoppel would unduly  
25 damage the public interest contrary to established law.

26

1 Under the facts of *Valencia*, the Court found that there was a genuine issue of material fact as  
2 to the first element of the estoppel claim where Valencia met with the Department of Revenue to  
3 discuss the issue three times and the Department stated in three letters to the taxpayer that  
4 transportation charges were not subject to tax and later claimed that the transaction at issue was  
5 taxable. *Valencia*, 191 at 579-580, 959 P.2d at 1270-71. Unlike the facts of *Valencia*, there are no  
6 material issues of fact in this case to support an estoppel claim. There was no formal act by the State.  
7 ISI's alleged reliance on Brown's rendition of a verbal conversation with a Division employee in this  
8 case was patently unreasonable. ISI had a duty to investigate the legal nature of the investment to  
9 determine if it was a security. There is no evidence that ISI did any independent investigation; ISI  
10 relied solely on Brown's representations concerning his alleged conversation with "Wendy" at the  
11 Division.

12 **C. The ALJ Should Strike Any Defense Based Upon Reliance On the Alleged Oral**  
13 **Statement of a Division Employee.**

14 Based upon the foregoing discussion, ISI should be precluded as a matter of law from any  
15 defense to liability based upon reliance upon the verbal statement of a Division employee purportedly  
16 made to Brown as to the legal nature of the payphone investments. The Division requests a ruling that  
17 ISI is precluded from any such defense.

18 ISI cannot prove any of the elements of estoppel as a matter of law. Even if this was an  
19 appropriate case to apply those elements to the facts of the case, no estoppel can be invoked against the  
20 state where, as here, the substance of the alleged statement involved a mistake of law. The government  
21 is not estopped "from correcting a mistake of law." *Thomas and King, Inc., supra*, 92 P.3d 429, 429  
22 Ariz. Adv. Rep. 68 (copy of case attached hereto).

23 There are no material facts at issue in this motion. This is a legal question for the ALJ. ISI  
24 should be precluded from raising any defense based upon the alleged statements of a Division  
25 employee as stated in Brown's testimony in his examination under oath. ISI has offered no facts or  
26 law that would support such a defense.

1 **CONCLUSION**

2 The Division requests that the ALJ deny ISI's Motion for Order Allowing Deposition of  
3 Wendy Coy because ISI has no need to take Ms. Coy's deposition, and the stated purpose for taking  
4 the deposition is to elicit testimony that is not relevant or material.

5 Further, the Division requests a ruling that ISI is precluded by law from any defense to  
6 statutory liability based upon the alleged statements of its employee because ISI had no right to rely on  
7 the alleged statements, or any mere verbal statement of a state employee, as a matter of law.

8 RESPECTFULLY SUBMITTED this 23rd day of August, 2004.

9  
10 By:



11 Pamela T. Johnson  
12 Attorney for the Securities Division of  
13 the Arizona Corporation Commission

14 ORIGINAL and 13 copies of the foregoing  
15 hand-delivered this 23rd day of August, 2004 to:

16 Docket Control  
17 Arizona Corporation Commission  
18 1200 West Washington Street  
19 Phoenix AZ 85007

20 COPY of the foregoing hand-delivered  
21 this 23rd day of August, 2004 to:

22 Marc Stern, Esq.  
23 Administrative Law Judge  
24 Arizona Corporation Commission  
25 1200 West Washington Street  
26 Phoenix AZ 85007

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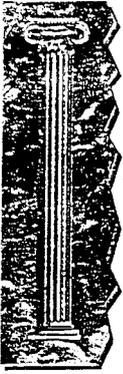
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Attorneys for Respondent  
InterSecurities, Inc.

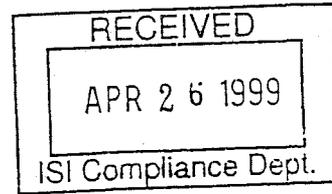
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# FINANCIAL BENEFIT GROUP, INC.



Bob,

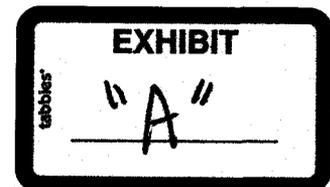
Please review these materials regarding the phone ~~book~~ business opportunities that we talked about on April 19th. Let me know as soon as possible if you can. Call me at 602-706-3900.

Thanks,

Greg Grown

If this OK to market, please return materials.

ACC00866



GBROWN 003

3233 E. CHANDLER BLVD. STE 18B • PHOENIX, AZ 85044  
TEL: (602) 706-3900 • FAX: (602) 706-6231 • TOLL FREE: (888) 540-2899

SECURITIES OFFERED THROUGH INTERSECURITIES, INC. BRANCH OFFICE: 7373 N. SCOTTSDALE RD., A-287, SCOTTSDALE, AZ 85253 (602) 991-6711  
MEMBER NASD, SIPC AND REGISTERED INVESTMENT ADVISOR

# FAX

Date: 4/26/99

Number of pages including cover sheet: \_\_\_\_\_

To:

Greg Brown

From:

Rodney A. Tidwell

Assistant Vice President

Compliance

Phone:

Fax phone: 602-706-6231

CC:

Phone: 727-299 1800 x 2940

Fax phone: 727-299 1678

REMARKS:  Urgent  For your review  Reply ASAP  Please comment

Re: BCI/ETS Payphones, Arizona was one of the states that uncovered fraudulent payphone operations, check with the Commissioner of Securities to see if this operation has A) operated in AZ B) Has a clean record. If yes to both questions, let me know and a decision will be made - your literature will then be returned.

D

ACC00014

EXHIBIT  
"B"

ISI 00004

Brown EXHIBIT 5  
DATE 4/29/02  
Dawna J. Clayton, RPR

April 28, 1999

To: Rodney A. Tidwell, Assistant Vice President Compliance, Intersecurities, Inc.

Re: Legitimacy of Pay Phone Business Opportunity

Yesterday I had a phone conversation with an attorney for with Arizona Securities Department, Wendy, regarding two companies that have been made known to me, ETS Phone Management Co. with BCI Financial the leasing company in affiliation, and Phoenix Telecom with Tri-Financial the leasing Co. that are selling opportunities for customers to purchase pay phones directly. Both companies had clean records, she had no knowledge of having a problem with either company, and both companies have and are operating in Arizona.

She did reference two companies, Paramount Pay Phones, and Pinnacle Pay Phones, as having problems in the past, as they operated as limited partnerships, and should have been registered as securities. The companies I am inquiring about in contrast, allow the client to own the actual phone, individually, they are not pooling together all clients and therefore creating a limited partnership situation.

I hope this helps to provide the necessary information you needed Rodney, to make a clarification on this. I can be reached at (480)706-3900. I appreciate your time in this matter.

Sincerely,



Gregory Brown.

ACC00868



GBROWN 005

InterSecurities, Inc.

# FAX

Date: 4/29/99  
 Number of pages including cover sheet: 1

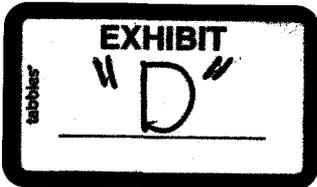
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 Phone: \_\_\_\_\_  
 Fax phone: 602-706-6231  
 CC: \_\_\_\_\_

From: Rodney A. Tidwell  
Assistant Vice President  
Compliance  
 \_\_\_\_\_  
 \_\_\_\_\_  
 Phone: 727-299 1800 x 2940  
 Fax phone: 727-299 1678

REMARKS:     Urgent     For your review     Reply ASAP     Please comment

*Re: ETS Payphone/BSE Communications*  
*I have reviewed the material and received your request from the state - and this activity is approved.*  
*R*

ACC00867





Rep  
File

July 25 1996

Mr. Robert Shearburn  
Innovative Financial Services, Inc.  
11001 N. Black Canyon Hwy., Suite 320  
Phoenix, Arizona 85029

Re: Outside Business Activity/AmTel Communication Systems, Inc.

Dear Mr. Shearburn:

Gordon Hippner, Vice President, Compliance asked me to review the information you provided regarding your request to participate in the marketing of the AmTel Communication Systems, Inc. pay telephone program.

The Securities and Exchange Commission, as well as several state securities regulators, have reviewed various pay telephone programs similar to AmTel and have frequently determined that the "business opportunities" being marketed were, in fact, unregistered securities.

One of the key factors in making such a determination is the level of support that the promoter provides in the operation of the business. When the promoter sells the equipment, selects the site, installs the telephones, and provides for the maintenance and service of the telephones, there is a significant chance that the securities regulators would deem such a program to be a security. Rather than offering a business opportunity, wherein the success or failure of the business depends largely upon the purchaser/owner, the AmTel program seems to be more of a passive investment where the success is largely, if not totally, due to the efforts of the promoter.

For the reasons stated above, InterSecurities, Inc. cannot approve your request to become a sales representative for the AmTel program. If you have any questions please feel free to call me at the number below, extension 1705.

Sincerely,

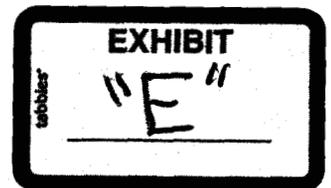
Ronald T. Klimas  
Assistant Vice President and Counsel

✓ cc: Gordon Hippner

P.O. Box 9053 Clearwater, Florida 34618-9053  
(813) 585-6565 (800) 322-7161 Fax (813) 587-1832

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